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WRITTEN EX PARTE VIA FACSIMILE

December 16, 1999

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Application by New York Telephone Company, et al., for Authorization to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295.*

Dear Ms. Salas:

BellSouth hereby responds to the Commission's request for comment on supplemental submissions by the State of New York and Bell Atlantic. Public Notice, *Ex Partes* Requested in Connection with Bell Atlantic's Section 271 Application for New York, DA 99-2721 (rel. Dec. 3, 1999) ("December 3 Notice"); see also *Ex Parte* Letter Filed in Connection with Bell Atlantic's Section 271 Application for New York, DA 99-2779 (rel. Dec. 10, 1999) ("December 10 Notice").

The Commission is under a statutory mandate to consult with the relevant state commission regarding a BOC applicant's satisfaction of section 271(c). 47 U.S.C. § 271(d)(2)(B). Moreover, the Commission has pledged to "consider carefully state determinations of fact that are supported by a detailed and extensive record." South Carolina Order, 12 FCC Rcd 539, 554-555, ¶ 29 (1997). The Commission accordingly should give full weight to the New York commission's submission of evidence to support its prior recommendations.

Relevant evidence submitted by Bell Atlantic likewise should be considered. In that regard, the December 3 Notice and December 10 Notice highlight fundamental flaws in the Commission's restrictions on post-application submissions. Rather than promoting efficient and reliable decision-making, the current section 271 procedures frustrate those objectives.

The Commission's special procedures for section 271 applications were intended to further three goals. First, they were designed to promote fairness to all parties. Michigan Order, 12 FCC Rcd 20543, 20572, ¶ 52 (1997). Second, the procedures were intended to allow the state commission and Department of Justice ("DOJ") to make their comments based upon a complete record. Id. at 20572-73, ¶ 53. Third, the procedures were supposed to save Commission time and Commission resources, by fixing the record early in the proceeding. Id. at 20573, ¶ 54. However well-intentioned, the current rules are not serving any of these purposes.

Fairness to all Participants. With respect to the first goal, fairness to participants, it is not fair to any party if the Commission bases its decision upon an incomplete or inaccurate record. The best way to ensure fairness and accuracy is to gather relevant, complete, and up-to-date evidence. The current rules hamstring the Commission in doing this.

The most serious problem lies with the rule that the BOC should provide with its application "all of the factual evidence on which the applicant would have the Commission rely." Public Notice, Updated Filing Requirements for Bell Operating Co. Applications Under Section 271 of the Communications Act, DA 99-1994, at 3 (rel. Sept. 28, 1999) ("Updated Requirements"). The Commission has even suggested that the BOC "must" anticipate opponents' arguments in its application. Michigan Order, 12 FCC Rcd at 20575, ¶ 57. Commenters, on the other hand, have affirmatively been "encourage[d]" to address any issues they like. Id. at 20750, ¶ 398. And while the BOC may respond, it is asked to match the particular evidence used by the commenter – not to make the best or most complete response to the issue raised. Updated Requirements at 7.

The Commission's asymmetrical rules unnecessarily inflate the size of BOC applications, because the BOC must try to include whatever may be relevant to opponents' future arguments. In direct response to the Commission's requirements, applications have grown and grown. Bloated applications represent a huge expense to the applicant, and make it more and more difficult for commenters and the Commission to sift out significant information.[1] Furthermore, some opponents almost invariably make arguments the BOC has not seen perfectly in its crystal ball, and then invoke the Commission's procedural rules to shield their own submissions from rebuttal. Opponents also have an overwhelming incentive to provide the Commission incomplete evidence (say, evidence covering carefully selected dates only), because they can later argue that the BOC is prohibited from telling the whole story in its reply.

Current disputes about DSL providers' access to information regarding the make-up of unbundled local loops illustrate the problem. In its most recent section 271 decision, the Commission set out "a clear road map" to checklist compliance – which did not mention this issue at all. See Second Louisiana Order, 14 FCC Rcd 20599, 20819 (1998) (Separate Statement of Commissioner Tristani). Opponents have made access to loop make-up information a

[1] SBC's Oklahoma application spanned approximately 5,000 pages, Ameritech's application for Michigan was 12,000 pages. BellSouth's applications for Louisiana in 1997, South Carolina in 1997, and Louisiana in 1998 were 15,000, 35,000, and 50,000 pages, respectively. Bell Atlantic-New York's application was close to 90,000 pages. Merely reproducing the necessary copies of an application can easily cost an applicant well over $100,000.

centerpiece of their attack on Bell Atlantic's application, and the Commission now appears to have accepted this as a core issue. See December 10 Notice. BOCs will know to address this particular issue in future applications, but as this examples illustrates, it is flatly impossible for a BOC to anticipate the next new stop on the Commission's "road" to section 271 relief.

The record of section 271 proceedings is littered with procedural motions relating to the Commissions "new evidence" rules. Such motions were filed in the Michigan, South Carolina, Second Louisiana, and New York proceedings. But with the exception of a motion by BellSouth in the South Carolina proceeding, this Commission has never granted such a motion to strike in any section 271 proceeding. See Michigan Order, 12 FCC Rcd at 20752, ¶¶ 406-408 (denying Ameritech's, AT&T's, and MCI's Motions to Strike); South Carolina Order, 13 FCC Rcd at 672-673, ¶¶ 242-244 (denying AT&T's Motion to Dismiss and granting in part BellSouth's Motions to Strike); Second Louisiana Order, 14 FCC Rcd at 20809, ¶ 371 (denying AT&T's Motion to Strike). The plethora of motions, and dearth of results, highlights the confusion surrounding the Commission's requirements, and the incentives to file strategic motions.

Enforceability of Commission requirements is another aspect of procedural fairness. Here too, the current requirements fail the test. As Bell Atlantic and AT&T have agreed in this proceeding, the line between what is and is not permitted in section 271 pleadings remains unclear. AT&T's Reply to Bell Atlantic's Opposition to AT&T's Motion to Strike at 12; Bell Atlantic's Opposition to AT&T's Motion to Strike at 14. Worse yet, the ambiguity of the current procedural rules is being used to argue for new substantive restrictions on interLATA relief. AT&T now asserts that a BOC cannot file its application until after the state commission has concluded a formal review of the application, see AT&T's Reply at 8, a proposed requirement that directly contravenes the Act and surely was not intended by the Commission. See 47 U.S.C. § 271(d)(1) (BOC may file section 271 applications "[o]n and after the date of enactment of the Telecommunications Act of 1996").

Assisting the State Commission and Department of Justice. By the same token, rejecting relevant evidence in the name of the state commission and DOJ, is nonsensical. Contrary to the Commission's theory, these agencies cannot have "a full and complete record" before them when they file initial comments. Michigan Order, 12 FCC Rcd at 20572, ¶ 53. The state commission files on the same day as other commenters, and both agencies file before replies. See Updated Requirements at 5-7. On the other hand, state commissions and DOJ are just as entitled to file replies and to make ex parte presentations as other interested parties. (Indeed, they have special rights in this regard, see id. at 8-9.) Thus, like the Commission itself, the state and federal agencies are best served in making their evaluations by having access to a full and current record that addresses all issues in controversy.

Saving the Commission Time and Effort. It can hardly be said that the Commission's rules are serving their purpose of simplifying Commission review. Considering motions to strike is now a routine facet of the Commission's section 271 review, which must be conducted within the 90-day deadline. In order to rule on such motions, the Commission must review the evidence that allegedly should be excluded. Moreover, ex parte filings have always been allowed after the 45th day, and Commission is now waiving page limits on such submissions. See December 3

Notice & December 10 Notice. Finally, as discussed above, the rules force BOCs to file unnecessarily large and cumbersome applications. Evaluating such large volumes of information within the statutory time limit doubtless is a huge drain on the Commission's resources and manpower. In short, the Commission's special restrictions on submissions in section 271 proceedings waste far more time (of the parties as well as the Commission) than they save.

There is nothing qualitatively different about fact-gathering in section 271 proceedings, and thus no reason for qualitatively different rules. Rather, the Commission should abandon its failed experiment in distinguishing permissible from impermissible evidence and instead weigh all relevant evidence. Any concerns that an applicant might attempt to "sandbag" opponents by withholding key information until late in the proceeding would be unfounded, as Commission precedent requires a BOC to make out a prima facie case in its initial application. See Michigan Order, 12 FCC Rcd at 20567-68, ¶ 44. If any modification to the Commission's generally applicable rules were required in light of the quantity of record materials in section 271 proceedings, that modification would be minor, such as a restriction on ex parte submissions close to the expected decision date. Cf. December 10 Notice (warning that Commission may prohibit ex parte communications on or after December 17, 1999).

Please call me at 202.463.4113 if you have any questions regarding this matter.

Respectfully submitted,

Kathleen B. Levitz

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cc: Chairman William Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
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